Supreme Court No. 836604
Court of Appeals No. 36944-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY JACKOWSKI and ERI TAKASI, husband and wife,

Plaintiffs/Respondents.

v.

HAWKINS POE, INC., dba Coldwell Banker Hawkins-Poe Realtors,

Defendants/Petitioners,

and

DAVID BORCHELT and ROBIN BORCHELT, husband and wife; HIMLIEREALTY, INC., VINCE HIMLIE, broker for Windermere Himlie Real estate, real estate brokers, and ROBERT JOHNSON and JEFF CONKLIN, real estate agents,

Defendants/Respondents.

ANSWER OF RESPONDENTS HIMLIE REALTY, INC. DBA WINDERMERE REAL ESTATE/HIMLIE AND JEFF CONKLIN TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Court Rules

Other Authorities

I. INTRODUCTION

It is difficult to imagine a civil case that would present a stronger case for review than this one does. Not because this case is extraordinary, but because it is so ordinary. At least it would have been prior to this Court's decision in *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). That decision has upended and cast into doubt causes of action that have been recognized for more than a century. This Court already granted review of one of the issues presented in this case, but that appeal was subsequently dismissed by Stipulation. *Carlile v. Harbour Homes, Inc.*, No. 828121.

The Court of Appeals decision in this case sets the precedent for an endless series of arguments for exceptions to the economic rule whenever it produces an undesired result without any principled basis to decide them. *Alejandre* announced a single economic loss rule, and this Court should either apply that rule uniformly, including to claims for fraud and claims against real estate brokers, or clarify what it did intend in *Alejandre*.

II. RESPONSE TO ISSUES PRESENTED FOR REVIEW

Issues Presented By Hawkins Poe

1. Whether this Court should reverse the decision of Division Two because it wrongly creates new exceptions to the economic-loss rule

for "common law and statutory claims" and professional-malpractice claims, in direct contravention of Berschauer/Phillips Const, Co. v. Seattle Sch. Dist. No .1, 124 Wn.2d 816,822,881 P.2d 986 (1994).

Windermere disagrees with the wording of this Issue as stated, but concurs that the Court should consider the underlying issue.

2. *Whether this Court should reverse Division Two's decision because it wrongly states that real estate professionals owe their clients supposed fiduciary duties, which RCW 18.86 et seq. abrogated.*

Windermere disagrees with the wording of this Issue as stated, but concurs that the Court should consider the underlying issue.

3. *Whether this Court should reverse Division Two's decision because it erroneously implies that RCW 18.86 et seq. creates a new right of action, whereas that statute was enacted to restrict rather than expand the liabilities of real estate professionals.*

Windermere concurs that this Court should identify the nature of the private remedy for violation of Chapter 18.86 RCW.

Issues Presented by Borchelts

1) Whether Washington's economic-loss rule bars fraudulent misrepresentation claims arising from parties' contractual agreements.

Windermere concurs that the Court should consider and decide this issue.

2) Whether the statutory scheme set forth in Chapter 64.06 RCW allows a buyer to seek remedies outside the scope of the limited rescission remedy explicitly authorized under RCW 64.06.040, where the cause of action is based solely on Form 17 disclosures required pursuant to RCW 64.06.020.

Windermere believes that this Court has already answered this question in the affirmative in *Svendsen v. Stock*, 143 Wn.2d 546, 23 P.3d 455 (2001).

3) Whether a plaintiff/buyer asserting a claim of fraudulent concealment of fill must prove the fill defect would not have been disclosed by a careful, reasonable inspection by the purchaser.

Windermere believes that this Court has already answered this question in the affirmative in *Alejandre v. Bull*, 159 Wash.2d 674, 683, 153 P.3d 864, 868 (2007), but requests that this Court grant review to clarify the buyer's burden on summary judgment.

New Issue Presented for Review

Pursuant to RAP 13.4(a) and 13.4(d), Windermere seeks review of the following additional issue:

1. Whether this Court should reverse Division Two's decision reversing summary judgment for Windermere because the Court of

Appeals failed to consider whether the opposing party had presented adequate admissible evidence of a material issue of fact.

III. STATEMENT OF THE CASE

Like *Alejandre*, this case is a routine misrepresentation case arising out of a residential real estate transaction. Jackowski purchased the property from the Borchelts. Hawkins Poe represented Jackowski as buyer's agent, and Windermere represented Borchelt as the listing agent. CP 1391-1392 (Complaint). Jackowski alleges that the presence of fill dirt and the risk of landslides was misrepresented by the other parties. *Id.*

It is undisputed that Jackowski received a letter from Mason County Department of Community Development stating that the property contained "Aquatic Management" and "Landslide Hazard." critical areas. CP 549. It further is undisputed that despite having an inspection contingency (CP 540, 1155-56), Jackowski failed to conduct <u>any</u> investigation regarding soils stability before the sale closed. CP 576.

Almost two years after the sale closed, a landslide occurred on the property. CP 562-565, 1392. Jackowski sued the seller and brokers, alleging that they knew or should have known that the property had experienced prior landslides and had fill material, but had failed to disclose these facts to Appellants. CP at 1391-94 (Complaint).

On cross motions for summary judgment, the trial court largely dismissed the claims against Borchelt and Hawkins Poe under the economic loss rule, and dismissed most of the claims against Windermere because Jackowski had information about the soil conditions but failed to investigate. CP 76-77, 104.

Division Two of the Court of Appeals granted discretionary review and issued a published decision affirming in part and reversing in part on June 16, 2009, *Jackowski v. Borchelt*, 151 Wn.App. 1, 209 P.3d 514 (2009). The respondents all filed motions for reconsideration, which were denied without a response or argument.

IV. ARGUMENT

A. ECONOMIC LOSS RULE.

It would be impossible to overstate the significance of this Court's decision in *Alejandre* or the uncertainty that it left behind. *Alejandre* itself effectively abrogated negligent misrepresentation, unless physical injury or property damage resulted, a combination that is hard to imagine. *Alejandre*, 159 Wash.2d at 684. Moreover, the principles set forth in *Alejandre* cannot logically be limited to negligent misrepresentation or real estate sales, but inextricably lead to other theories and factual situations. The Court of Appeals decisions attempting to interpret and apply *Alejandre* in those contexts are both contradictory and confusing.

1. **The *Alejandre* Decision.**

Alejandre arose out of a fact pattern that makes up a significant portion of reported Washington cases: seller misrepresentation in the sale of real estate. In *Alejandre*, the buyer of a house with a defective septic system sued the seller for negligent misrepresentation, fraud and fraudulent concealment. *Alejandre*, 159 Wn.2d at 677. The trial court dismissed the buyer's claims at the close of her case at trial. *Id.* Division Three of the Court of Appeals reversed, finding evidence to support the claims and holding that the economic loss rule only applied when the parties actually negotiate remedies for tort claims. *Id.* This Court then reversed the Court of Appeals, holding that the economic loss rule applies whether or not the parties negotiated over tort remedies, and that the buyer had failed to present sufficient evidence of fraud as a matter of law. *Id.*

Subsequent court decisions have uniformly interpreted *Alejandre* as broadly abrogating negligent misrepresentation claims. *E.g.*, *Jackowski*, 151 Wn.App. at 15; *Carlile v. Harbour Homes, Inc.*, 147 Wash.App. 193, 203, 194 P.3d 280, 285 (2008). But those courts also have been confronted with the ramifications of *Alejandre* in other factual and legal contexts. As perhaps best illustrated by this case, the attempt to follow *Alejandre* without extinguishing entire bodies of established law has proven difficult if not impossible.

2. Division One Opinions.

In *King v. Rice*, 146 Wash.App. 662-665, 191 P.3d 946, 948 (2008), the seller of a parcel of real estate retained the right to remove a modular structure on the property. A dispute arose after closing, and the buyer ultimately demolished the structure with a backhoe. *Id.* at 666. The seller then sued the buyer for contract and tort claims. *Id.* at 667. The trial court granted summary judgment to the buyer on several grounds. *Id.* at 667. In its decision, the *King* court rejected the buyer's economic loss rule argument because "the rule does not bar recovery for personal injury or damage to property other than a defect in the property." *Id.* at 671.

Just over a month after *King*, Division One published its game-changing decision in *Carlile v. Harbour Homes, Inc.*, 147 Wash.App. 193, 194 P.3d 280 (2008). The question in the case was stark and simple: Does the economic loss rule bar claims for fraud when economic damages are sought? Many in the bar read *Alejandre* as already excluding fraud claims from the economic loss rule, but the *Carlile* court carefully examined the decision and came to the opposite conclusion. *Alejandre* states that fraudulent concealment is not subject to the economic loss rule, but expressly did "not address the question whether any or all fraudulent representation claims should be foreclosed by the economic loss rule." *Alejandre*, 159 Wash.2d at 690 n.6.

Ultimately, the *Carlile* court appears to have distinguished fraudulent concealment claims from fraudulent misrepresentation claims based on the number and nature of the elements for each claim. *Carlile*, 147 Wash.App. at 204-05. Finding no principled reason to depart from the plain rule announced in *Alejandre*, the *Carlile* court held that fraud claims are subject to the economic loss rule. *Id.* at 205-06.

The losing homeowners sought review by this Court, and on July 8, 2009, this Court granted review on the question whether the economic loss rule applies to claims of fraudulent misrepresentation. Docket, Case No. 828121. On September 10, 2009, however, the parties filed a Stipulated Motion for Dismissal of the appeal. *Id.* This Court granted that motion on September 30, 2009 and issued a Mandate on October 8, 2009. This Court therefore already has determined the issue whether the economic loss rule applies to claims for fraudulent misrepresentation warrants review and should reach the same conclusion in this case.

3. Division Two Opinions.

In *Stieneke v. Russi*, 145 Wash.App. 544, 557, 190 P.3d 60, 67 (2008), Division Two based application of the economic loss rule on whether "a product has injured only itself, or has injured other property as well." The *Steineke* court also interpreted *Alejandre* as standing for the

principle that "the economic loss rule does not apply to claims of fraud." *Id.* at 560.

Less than a year later, Division Two reversed itself, holding that "the economic loss rule applies and bars the Coxes' counterclaims against the DeMers for negligent representation and fraudulent representation." *Cox v. O'Brien*, 150 Wash.App. 24, 36, 206 P.3d 682, 688 (2009), but the *Cox* court did not even refer to its published decision in *Steineke*.

This case was decided by a different panel of the same court just over a month later. In its decision in this case, the Court of Appeals flatly stated that "the Jackowskis' fraud and fraudulent concealment claims fall outside the scope of the economic loss rule." *Jackowski v. Borchelt*, 151 Wash.App. 1, 17, 209 P.3d 514, 522 (2009). But the court did not cite or acknowledge either *Steineke* or *Cox*.

In considering whether the economic loss rule applied to the claims against the brokers, the Court of Appeals recognized that doing so would "abrogate[] all professional malpractice claims, particularly where a client hires a professional and, therefore, establishes a privity of contract with that professional." *Jackowski*, 151 Wash.App. at 14. In essence, the Court of Appeals in this case was faced with the same dilemma that the *Carlile* court faced: Does *Alejandre* mean what it says, even if that would result in the abrogation of established claims?

Unlike the *Carlile* court, however, the Court of Appeals in this case deflected instead of answering the question. After recognizing that applying *Alejandre* to claims for professional malpractice, "would be to abrogate professional malpractice claims for all cases not involving physical harm," the court refused, but its reasoning consisted of nothing more than its statement that: "We do not believe this to be the *Alejandre* court's intention." *Id.*

Nothing in *Alejandre* suggests any such limit. To the contrary, in *Alejandre*, this Court extensively relied on its prior decision in *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wash.2d 816, 823, 881 P.2d 986, 990 (1994), in which this Court stated: "we hold the economic loss rule does not allow a general contractor to recover purely economic damages in tort from a design professional." The professionals in that case were "an architect, an engineer and an inspector, none of whom were in privity of contract with the general contractor." *Id.* at 820. The Court of Appeals in this case cited *Berschauer/Phillips* one time, but did not address its application of the economic loss rule to claims against professionals. *Jackowski*, 151 Wash.App. at 12.

The Court of Appeals also recognized an exception to the economic loss rule when the plaintiff seeks rescission as the remedy, even if that remedy is based on a tort claim. *Id.* at 15-16. After acknowledging

this Court's statement in *Alejandre* that "the economic loss rule precludes any recovery under a negligent misrepresentation theory" (*Id.* at 16 *quoting Alejandre*, 159 Wash.2d at 677), the Court of Appeals held that the buyer could seek rescission because "they entered into a contract based on misrepresentations." *Id.* at 16.

Most recently, Division Two addressed the economic loss rule in *Water's Edge Homeowners Ass'n v. Water's Edge Associates*, ___ Wn.App. ___, ___ P.3d ___, 2009 WL 3087495, 8-9 (September 29, 2009). In *Water's Edge*, a homeowners association of a conversion condominium settled a claim against the declarant and property manager for a payment of $215,000, a stipulated judgment with a covenant not to enforce it against the defendants, and an assignment of the association's bad faith claims against its insurer. In the subsequent reasonableness hearing, the trial court rejected the settlement as unreasonable and dismissed the association's claims.

One issue that the court considered was whether the economic loss rule would have barred the underlying claims. The *Water's Edge* court held that the economic loss rule would not apply to the claims against the property manager because the association had no contract with the declarant's property manager, and "the economic loss rule does not apply when there is no contact." *Id.* at 9.

With respect to the claims against the declarant, however, the *Water's Edge* court held that "the economic loss rule would likely apply to the HOA's misrepresentation and fiduciary duty claims, which sound in tort." *Water's Edge*, 2009 WL at 9.

3. Division Three Opinion.

Just two months after *Alejandre* was decided, Division Three of the Court of Appeals published its decision in *Baddeley v. Seek*, 138 Wash.App. 333, 338, 156 P.3d 959, 961 (2007), a case that appears to be analogous to *Berschauer/Phillips*. A property owner sued an engineer who had been hired by his contractor. The trial court dismissed the case, and the homeowner appealed. The *Baddeley* court cited neither *Berschauer/Phillips* nor *Alejandre*, but held that the economic loss rule did not apply at all because "the Baddeleys did not contract with STI, and are not third-party beneficiaries of the contractor-STI contract." *Baddeley*, 138 Wn.App. at 336.

4. Current State of the Law.

As matters stand today, it appears that claims for negligent misrepresentation have been abrogated unless the parties have no contractual relationship or the damages sought are personal injuries or property damage. Since the elements of the claim require a transaction

and limit the recovery to pecuniary loss, such a claim logically cannot exist.

In Division One, and likely Division Two as well, claims for fraud likewise have been all but extinguished. Fraud theoretically could arise outside the context of a contractual relationship, but Windermere has not located a published opinion in that context. And it is difficult to see how an act of fraud could cause personal injury or property damage. Division Three acknowledged that some jurisdictions have an exception for fraud in *Baddeley v. Seek*, 138 Wash.App. 333, 338-339, 156 P.3d 959, 961 (2007), but did not expressly recognize such an exception or cite *Alejandre*.

Claims against architects, engineers and inspectors for professional negligence appear to be subject to the economic loss rule under *Berschauer/Phillips*, but claims against real estate agents are not according to the Court of Appeals decision in this case. Left unanswered is whether the economic loss rule would bar a claim for negligent misrepresentation against a real estate broker.

Privity of contract is not required for application of the economic loss rule according to *Berschauer/Phillips*, but a contractual relationship was required by Division Three in *Baddeley* and by Division Two in *Water's Edge*. This question appears to be before the court in *Affiliated*

FM Insurance Company v. LTK Consulting Services, Inc., Supreme Court No. 82738-9, and set for oral argument on October 20, 2009. To the extent not decided in *Affiliated FM Insurance*, this case presents an ideal factual context to address the privity issue because of the varied contractual relationships between the parties.

5. Grounds for Review.

This case amply meets the criteria of 13.4(b). As set forth above, the decision in this case is in direct conflict with another decision of Division Two that was published just over a month earlier. RAP 13.4(b). To the extent that the Court of Appeals decision in this case refused to apply the economic loss rule in the context of professional negligence, it was contrary to *Berschauer/Phillips* and, for that matter, to *Alejandre*. RAP 13.4(b)I(1). This appeal addresses the arguable abrogation of claims for fraud and professional negligence. Few issues could more directly or broadly affect the public interest. RAP 13.4(b)(4).

B. Common Law Duties of Real Estate Brokers.

Although the language of RCW 18.86.110 is awkward, it can be read no other way than to provide that Chapter 18.86 supersedes the common law to the extent that it is inconsistent with the statute. And because RCW Chapter 18.86 provides that: "Unless additional duties are agreed to in writing signed by a seller's agent, the duties of a seller's agent

are limited to those set forth in RCW 18.86.030 and the following . . ." (RCW 18.86.040(1), 18.86.050(1), 18.86.060(2)), imposing any additional duties under pre-existing common law necessarily would be inconsistent with the limiting language of the statute.

Under the plain language of the statute, the common law certainly could be used to understand or define the statutory duties to the extent that they overlap, but the statute unmistakably abrogates inconsistent common law. When a statute is not ambiguous, this Court simply enforces its plain meaning. *Dot Foods, Inc. v. Washington Dept. of Revenue*, ___ Wash.2d ___, 215 P.3d 185, 192 (2009).

To the extent that the unusual language of RCW 18.86.110 renders the provision ambiguous, the Court need not rely solely on the opinion of the person who drafted it or treatises. It should also consider the legislature's intent as expressed in the Final Bill Report, a downloaded copy of which is attached as Appendix I. The Final Bill Report begins by stating that under the common law, "the duties owed may be unclear," and that in a real estate transactions, "the issue of who an agent represents may also be unclear." 2EHB 1659 at p. 1 (Appendix I). The stated purpose of the statute was to clarify and redefine both the duties and the formation of the agency relationship by codifying and displacing the common law.

> The duties and the relationship of an agent to the principal (buyer or seller, landlord or tenant) are established in statute. The statute supersedes the common law rules applied to real estate licensees to the extent that they are inconsistent with the statute.

Id. This Court reached the same decision in 1997, when it stated that: "In 1996, the Legislature enacted comprehensive legislation which redefined the duties of real estate brokers." *Sing v. John L. Scott, Inc.*, 134 Wash.2d 24, 32 n.3, 948 P.2d 816, 820 (1997).

The Court of Appeals decision in this case effectively thwarts the stated legislative intent by reinstating the common law duties that the Legislature found unclear. Given the indisputable size and importance of real estate transactions, this decision fundamentally affects the public interest. RAP 13.4(b)(4).

C. Private Cause of Action Under Chapters 18.86 and 64.06 RCW.

> The handful of reported decisions referring to Chapters 18.86 or 64.06 RCW appear to have assumed that those statutes do create duties that were enforceable in a private action. For example, in *Preview Properties, Inc. v. Landis*, 161 Wash.2d 383, 389, 165 P.3d 1, 3 (2007), this Court reinstated a seller's judgment for his "claim under RCW 18.86.030."

RCW 64.06.050 limits the liability of a seller or agent under the Chapter, something that would make no sense if potential liability did not exist in the first place.

That is not to say that either statute creates a statutory cause of action. In *Bennett v. Hardy*, 113 Wash.2d 912, 920, 784 P.2d 1258, 1261 (1990), this Court discussed implied causes of action at length and relied in part on the Restatement of Torts.

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, **using a suitable existing tort action or a new cause of action analogous to an existing tort action.**

(Citing Restatement (Second) of Torts § 874A (emphasis added)). Chapter 18.86 redefined the duties of real estate agents and brokers, but did not create a statutory cause of action because existing tort causes of action already existed. Just as RCW 5.40.050 seamlessly incorporated violation of a statutory duty into negligence claims, courts have had no difficulty with treating RCW 18.86 as the source of a duty for existing causes of action against real estate agents and brokers.

Similarly, when it enacted Chapter 64.06, the Legislature addressed liability for statements provided in a Disclosure Statement, but it did so in the context of limiting that duty. RCW 64.06.050. It had no need to create a statutory cause of action because the common law comprehensively addresses a seller's or agent's liability for

misrepresentation, and the Disclosure Statement was merely written evidence of the disclosures that were made.

Chapters 18.86 and 64.06 merely establish duties and document disclosures, either of which may be the basis of established causes of action. The Court of Appeals in this case erred when it found a statutory cause of action that simply does not exist. Particularly in light of the Court's accompanying declaration that the common law duties continue to exist, this error compounds the lack of clarity that caused the Legislature to enact Chapter 18.86 in the first place. Because this decision affects every real estate transaction in which an agent or broker is involved, it directly and substantially affects the public interest. RAP 13.4(b)(4).

D. Buyer Diligence.

The Court of Appeals in this case reversed the summary judgment for Windermere on the fraudulent concealment claim relating to the fill on the property because the evidence presented by Windermere was not conclusive. *Jackowski*, 151 Wash.App. at 18-19. Because it had no evidence at all whether the fill cold have been discovered with a diligent investigation, the court reversed summary judgment on that issue.

In *Alejandre* the court clarified that because the plaintiff in a fraudulent concealment claim must prove, as an element of the claim, that it "would not have been discovered through a reasonably diligent

inspection." *Alejandre*, 159 Wash.2d at 690. The Court of Appeals decision in this case contradicts that holding by reversing summary judgment in the absence of any admissible evidence at all. RAP 13.4(b)(1). Summary judgment is warranted when the plaintiff fails to present admissible evidence in support of an element of its claim. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (cited in Windermere's Motion for Summary Judgment at CP 586). This Court should grant review and reaffirm that a plaintiff must present evidence that a defect could not be discovered through diligent investigation, and that the absence of evidence will not defeat summary judgment.

IV. CONCLUSION

In *Alejandre*, this Court stated that "a fraudulent concealment claim based on *Obde v. Schlemeyer*, 56 Wash.2d 449, 353 P.2d 672 (1960) is not barred by the economic loss rule" (*Alejandre*, 159 Wash. at 678), but nothing on *Obde* remotely addresses the economic loss rule, and before *Alejandre*, no court recognized it as an exception to the economic loss rule. *Obde* merely recognized a cause of action for fraudulent concealment, just as other cases have recognized causes of action for negligent misrepresentation, fraud and professional negligence. No court has ever articulated a principled reason why fraudulent concealment

should be excepted from the economic loss rule while negligent misrepresentation and fraud are not.

At a minimum, this Court should grant review and determine whether the economic loss rule bars claims for fraud, and whether claims against real estate brokers and other professionals are exempt. The "fundamental boundaries" between tort and contract law are no more or less sacrosanct if a different tort claim is asserted or a different defendant is sued. One economic loss rule should apply to all contracts and all claims unless a principled reason for an exception exists.

The Court of Appeals decision in this case immunizes sellers from liability, but makes real estate brokers liable. It interprets a statute designed to redefine a broker's duties as merely supplementing them. Whatever this Court's intent in *Alejandre* was, it surely was not to make real estate brokers solely liable for seller misrepresentations. This Court should grant review.

DATED this 19th day of October, 2009.

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DECLARATION OF SERVICE

I, Leslie Rothbaum, state:

On this day I caused to be mailed by U.S. Mail, postage prepaid, and by email to:

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A copy of the following documents:

Respondents' Windermere Real Himlie Real Estate and Jeff Conklin's Answer to Petitions for Review.

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of October, 2009 at Seattle, Washington.

Leslie Rothbaum

APPENDIX #1

FINAL BILL REPORT

2EHB 1659

C 179 L 96

Synopsis as Enacted

Brief Description: Regulating **real estate brokerage relationships.**

Sponsors: Representatives Mielke, Quall, Crouse, Costa, Kremen and Cooke.

House Committee on Commerce & Labor

Senate Committee on Labor, Commerce & Trade

Background: The duties owed by a **real estate** broker or sales agent to a buyer, seller, landlord, or tenant are based on the common law of agency. Agency is a consensual relationship between two persons where one (the principal) empowers the other (the agent) to act, and the agent acts based on that authority. Agency **relationships** can be created expressly in writing or by words or conduct. Conduct that determines an agency relationship in **real estate** sales and leasing includes paying a commission to the agent.

Duties owed by an agent to a principal in a **real estate** transaction include loyalty, obedience, disclosure, confidentiality, reasonable care and diligence, and accounting. The scope of these duties has evolved through the courts. In any given transaction, the duties owed may be unclear.

In the purchase and sale of **real estate**, the issue of who an agent represents may also be unclear. Licensed **real estate** brokers, affiliated brokers, and sales people may be involved in a firm that deals with both buyers and sellers or landlords and tenants. It may not be clear to the buyers or sellers who is representing their interests.

Summary: The duties and the relationship of an agent to the principal (buyer or seller, landlord or tenant) are established in statute. The statute supersedes the common law rules applied to **real estate** licensees to the extent that they are inconsistent with the statute.

An agent may represent only the buyer or the seller unless otherwise agreed in writing. Absent an agreement, the agent represents the buyer. A pamphlet describing the statutory duties must be provided to all parties by the **real estate** agent before any agency agreements or **real estate** offers are signed, before a party consents to dual agency, or before a party waives any rights designated as waivable.

General Duties of a Licensee

Certain duties apply to **real estate** licensees generally when performing **real estate brokerage** services, including the duty to

(1)exercise reasonable skill and care;

(2)deal honestly and in good faith;

(3)present all written offers, notices, and other communications in a timely manner;

(4)disclose all material facts known by the licensee and not easily ascertainable to a party;

(5)account for all money and property received in a timely manner;

(6)provide a pamphlet on the law of **real estate** agency to all parties; and

(7)disclose what party a licensee represents, if any, in a **real estate** transaction.

These duties cannot be waived.

The agent need not conduct an independent investigation of the property or of either party's financial condition. The agent has no duty to verify any information the agent reasonably believes to be reliable.

Duties of an Agent to the Seller or Buyer and Duties of a Dual Agent

Certain duties apply between a licensee agent and the seller, or a licensee agent and the buyer, or in a dual-agency relationship, including the duty to

(1)be loyal by taking no action that would be adverse to the client;

(2)disclose timely any conflicts of interest;

(3)advise the client to get expert advice on matters relating to the transaction that are beyond the agent's expertise; and

(4)refrain from disclosing confidential information about the client except under subpoena or court order.

These duties cannot be waived. The only duty that can be waived is the duty to make a good faith and continuous effort to seek a buyer for a seller or a seller for a buyer.

It is not a breach of duty to the principal for the agent, in the case of a seller, to show or list competing properties, or, in the case of a buyer, to show properties to competing buyers.

A **real estate** licensee may represent both the buyer and the seller if all parties agree in writing. The consent to this dual agency must include the terms of compensation.

Duration of the Agency Relationship

The agency relationship begins when the licensee performs **brokerage** services. The relationship continues until the licensee completes the services, the agreed upon period of service is ended, or the parties agree to termination. Once the **brokerage** relationship is terminated, an agent is obligated to account for all moneys and property received and to keep appropriate information confidential.

Compensation

Payment of compensation is not a factor in determining the existence of an agency relationship. A broker may be paid by any party to the transaction and may be paid by more than one party if the parties agree. A buyer's agent may be paid based on the purchase price without breaching any duty owed to the buyer.

Vicarious Liability

A principal (buyer or seller) is liable for the actions of the agent (**real estate** licensee) only if the principal participated in or authorized the act, or the principal benefitted from the act and a court determines that no judgment could be enforced against the agent or a subagent. A licensee agent is not liable for the acts of a subagent unless the licensee participated in or authorized the act.

Imputed Knowledge

There is no presumption of knowledge on the part of the principal (buyer or seller) of facts known by the agent or subagent of the principal.

Miscellaneous Provisions

The Director of the Department of Licensing may impose sanctions on a licensee for violation of the laws governing **real estate brokerage relationships**.

The provisions of this act apply when an **real estate** licensee represents a landlord or a tenant in a lease arrangement.

Only those agency **relationships** entered into after January 1, 1997, are subject to this law. If the parties agree in writing, agency **relationships** entered into before January 1, 1997, may also be subject to this law.

Votes on Final Passage:

House 94 0

Senate 48 0

Effective: January 1, 1997

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To: Leslie Rothbaum
Cc: Matthew Davis; Ellen Krachunis
Subject: RE: No. 836604 DEFENDANTS' ANSWER TO PETITIONS FOR REVIEW

Rec. 10-19-09

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From: Leslie Rothbaum [mailto:lrothbaum@demcolaw.com]
Sent: Monday, October 19, 2009 4:02 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Matthew Davis; Ellen Krachunis
Subject: No. 836604 DEFENDANTS' ANSWER TO PETITIONS FOR REVIEW

Jackowski v. Borchelt et al.
Supreme Court No. 836604
Court of Appeals No. 36944-3-II

Attached for filing is:
RESPONDENTS' ANSWER TO PETITION FOR REVIEW
Matthew F. Davis, WSBA No. 20939
Demco Law Firm, P.S.
5224 Wilson Ave. S. Suite 200
Seattle, WA 98118
(206) 203-6000

Please call if you have any questions.
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